

Judge Coughenour

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

GLEN SCOTT MILNER,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE  
NAVY,

Defendant.

No. CV-06-01301-JCC

UNITED STATES' MOTION FOR  
SUMMARY JUDGMENT

Note for May 11, 2007

Oral Argument Requested

Defendant United States Department of the Navy (the "Navy") hereby moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that there are no genuine issues of material fact and defendant is entitled to judgment as a matter of law. This Motion is based on the legal authorities and argument contained herein, the attached Declarations of Commander George N. T. Whitbred IV (the "Whitbred Declaration" at Ex. 1), and of Anthony J. Robinson (the "Robinson Declaration" at Ex. 2), the two attached maps of the Naval Magazine Indian Island and the surrounding community (Ex. 3 and Ex. 4), the administrative record filed in paper form with the Court, the other pleadings filed in this case, and any oral argument the Court may wish to entertain.

## INTRODUCTION

Over the last 25 years, Plaintiff Glen Scott Milner (“Milner”) has filed with the Navy many hundreds of requests under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, invariably seeking sensitive information about the Navy’s operations in the Puget Sound region. The Navy, which adheres to the principle of open government, has generally attempted to accommodate Milner’s requests, providing him with extensive documentation. The Navy has sought to withhold information only when the requested information is so sensitive that its disclosure would risk the lives and physical safety of Navy personnel and the general public, would reveal law enforcement techniques, procedures and guidelines, or would threaten the security of the United States’ or surrounding communities. The withholding of such sensitive information, of course, is permitted by FOIA Exemptions 1, 2, 3 and 7. See 5 U.S.C. §§ 552(b)(1), (2), (3), and (7).

This case fits the typical Milner pattern. Milner seeks information regarding explosive safety studies prepared with respect to the Naval Magazine Indian Island. In particular, Milner seeks access to a highly sensitive analysis known as Explosive Safety Quantity Distance arcs (“ESQD Arcs”). As is set forth in the Whitbred Declaration, Navy experts believe that the release of such ESQD Arcs pertaining to Naval Magazine Indian Island arsenal would disclose the location and quantity of dangerous explosives, ordnance or ammunition, which in turn would permit terrorists, and other persons of ill-will, to threaten the security of the base, and place in jeopardy the safety of base personnel and the surrounding community. Milner, on the other hand, insists not only on obtaining copies of the ESQD Arcs, but fully intends to publish them on the Internet – irrespective of the risks such publication might pose to the security of Armed Forces personnel and the safety of the surrounding community.<sup>1</sup>

The Navy believes that this is a case where the right of citizens to “know what their government is up to,” is outweighed by the practical need to protect the security of a military

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<sup>1</sup> Milner has made no secret of his ultimate goal – the removal of the Naval presence in the Puget Sound area, and, in particular, removal of nuclear weapons from the area. See <http://www.gzcenter.org/>. The motivations of a requestor in making a FOIA request, of course, are irrelevant to the question whether the documents in question are subject to the FOIA.

arsenal and the safety of the surrounding civilian community. As such, the government respectfully submits that the documents requested by Milner are protected from disclosure under FOIA Exemptions 7(F) and 2.<sup>2</sup> 5 U.S.C. §§ 552(b)(7)(F) and (b)(2).

#### **ADMINISTRATIVE HISTORY**

##### *The Processing of Milner's FOIA Requests:*

On December 7, 2003, in a letter directed to the Commanding Officer, Naval Magazine Indian Island, and again on February 3, 2004, in a second letter directed to the Ordnance Safety and Security Activity, Milner submitted two substantially identical FOIA requests seeking:

All documents on file regarding Explosive Safety Quantity Distance (ESQD) arcs or explosive handling zones at the ammunition depot at Naval Magazine Indian Island. This would include all documents showing impacts or potential impacts in the explosive handling zones to the ammunition depot and the surrounding areas.

[A]ll maps and diagrams of the ammunition depot at Indian Island which would show ESQD arcs or explosive handling zones; and

[All] documents regarding any safety instructions or operating procedures for Navy or civilian maritime traffic within or near the explosive handling zones or ESQD arcs at the ammunition depot at Indian Island.

Robinson Dec. ¶¶ 4, 5, 48; Administrative Record, Tabs 1 and 53.

In response, the Commanding Officer, Naval Magazine Indian Island, identified a total of 17 document packages (totaling approximately 1000 pages) which he believed were responsive to Milner's FOIA request. Robinson Dec. at ¶ 21. These 17 document packages were submitted to Navy General Counsel (the FOIA administrative appellate authority for Naval Magazine Indian Island), with a request that sensitive explosive safety information be withheld from the document packages to protect the security of the base. Robinson Dec. at ¶ 7. The General Counsel requested the opinion of the Naval Criminal Investigative Service regarding whether the materials were compiled for law enforcement purposes, the disclosure of which "could reasonably be expected to endanger the life or physical safety of any individual." Robinson Dec. at ¶ 24; see, generally, 5 U.S.C. 552(b)(7)(F). In response, the Naval Criminal Investigative

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<sup>2</sup> One additional document package is also protected by Exemption Three, 5 U.S.C. § 552(b)(3), because its disclosure would violate the export control laws of the United States. The Navy understands that this document is not in dispute between the parties, and accordingly has refrained from briefing the issue.

Service agreed that the disclosure of the information implicated law enforcement and public safety concerns. Id. Thereafter, the General Counsel also solicited the views of several other experts at various Navy activities around the country as to different portions of the 15 document packages. These consultations took place over the course of nearly three years, and resulted in several different administrative appeals. Robinson Dec. at ¶ 22. The Navy ultimately determined that certain of the documents could be released in their entirety and others could be released in redacted form.<sup>3</sup> However, there was broad consensus among the Navy experts that the actual ESQD Arcs should not be disclosed – that the release of these documents would present far too large a risk to security to be justified by the principle of open government. See generally, Whitbred Declaration.

In his Complaint, Milner spends considerable time complaining about the Navy's tortuous and lengthy administrative process. Complaint at ¶¶ 13-36. The Navy does not dispute that the administrative process in this case may have been unnecessarily lengthy and complicated.<sup>4</sup> Nevertheless, the lengthy administrative process ultimately resulted in the release to Milner of more documents than otherwise would have been the case. See Robinson Dec. at ¶¶ 32, 38, 42, 43, 46. Furthermore, there is no dispute now between the parties that Milner has exhausted his administrative remedies,<sup>5</sup> that all responsive documents have been identified, and that they have been adequately identified in the government's *Vaughn Index*. See pp. 12-26 of the Robinson Declaration. See generally, *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). The only question remaining for this Court is the one that ultimately matters, whether the documents listed in the

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<sup>3</sup> The Freedom of Information Act requires that any "reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of portions which are exempt." 5 USC §552(b). Accordingly, the Navy has redacted the records which it determined to be responsive to Milner's request and provided him with all reasonably segregable non-exempt portions of responsive information. *Church of Scientology v. Department of the Army*, 611 F.2d 738, 744 (9th Cir. 1979). See *Holland v. CIA*, 1992 WL 233820 at 11 (D.D.C. Aug. 31, 1992) (finding "sufficient showing of good faith" by agency in segregating exempt from non-exempt information, based on review of declarations, together with examination of redacted documents and fact that subsequent releases were made during litigation.)

<sup>4</sup> A complete summary of the administrative process is contained in the Robinson Declaration at pp 1 - 12.

<sup>5</sup> Milner was at all times free to seek relief in this Court. Under Section (a)(6) of the FOIA, a requestor is deemed to have exhausted his administrative remedies if the agency fails to make a decision within 20 days of an initial FOIA request or within 20 days of an appeal. 5 U.S.C. § 522(a)(A) and (C).

1 *Vaughn* Index are covered by FOIA Exemptions 7(F) and 2. In a FOIA case, the Court does not  
 2 review the quality of the agency's administrative process based on the "arbitrary and capricious"  
 3 standard of the Administrative Procedure Act. FOIA cases are to be determined by the Court *de*  
 4 *nov*o, based on the nature of the withheld documents themselves. 5 U.S.C. § 552(a)(4)(B);  
 5 Lewis v. Department of Labor, 419 F.3d 970, 977 (9<sup>th</sup> Cir. 2005) ("Review of agency access  
 6 decisions under FOIA and the Privacy Act is *de novo*, requiring no deference to the agency's  
 7 determination or rationale regarding disclosures.")

8  
 9 *Factual Analysis of ESQD Arcs for Naval Magazine Indian Island:*

10 In order to properly understand the factual issues in this case, the government would  
 11 strongly urge the Court to review the Whitbred Declaration, where the base Commander for  
 12 Naval Magazine Indian Island explains in detail why he believes the ESQD Arcs for the arsenal  
 13 are too sensitive to be released to the public. Commander Whitbred explains that in general,  
 14 ESQD Arcs are measurements of the effects of an explosion at varying distances, and, as such,  
 15 define minimum separation distances for various quantities of explosives based on required  
 16 degrees of protection. The separation distances identified by the ESQD Arcs are then used to  
 17 establish a reasonable level of safety with respect to Navy shore activities, as well as appropriate  
 18 levels of protection for adjacent public and private property. ESQD Arcs are accordingly  
 19 prepared based on the degree of protection needed, the type and amount of explosive material  
 20 involved, the segregation of these materials, their explosive effects and what are permissible  
 21 exposures given the risk involved. ESQD Arcs are then in turn used to design, array, and  
 22 construct ammunition storage facilities, and to organize operations with respect to handing of the  
 23 ammunition to minimize risk and maximize safety. Whitbred Dec. at ¶¶ 9 and 10.

24 Whitbred explains that if the ESQD Arcs for Naval Arsenal Indian Island were released,  
 25 they would constitute a blueprint for a terrorist or other potential adversary planning to attack the  
 26 arsenal. He writes that armed with this information, a lay person with a rudimentary knowledge  
 27 of mathematics could easily determine:  
 28

1. The precise location of ordnance magazines;
2. The types of items stored in them;
3. Which locations to target for maximum damage to personnel, critical infrastructure and disruption of loading and off-loading of ships;
4. The mission capability of the installation;
5. The installation's battle group capacity and operational sustainability;
6. The location of personnel and the precise numbers of personnel required to load and off-load a ship; and
7. The quantities of materials stored there.

Whitbred Dec. at ¶ 8.

Commander Whitbred goes on to explain that although ESQD Arcs are designed to be part of the Navy's explosives safety program – that is to protect property and people from harm that could occur from an incident, accident or breach of security – in the wrong hands ESQD Arcs can be used for exactly the opposite purpose – to harm persons or property or to threaten the security of the installation, and the safety of personnel on the installation and in nearby communities. Whitbred Dec. at ¶ 9. He explains how this information could be used to determine the precise location and quantity of ordnance magazines, as well as the types of items stored in them; and would allow a person of ill-will to target the precise locations which would cause maximum damage to personnel and critical infrastructure, and thus inflict the greatest possible destruction to life and property. *Id.* Whitbred states that part of his duty as base commander is to safeguard exactly the types of sensitive information which could be used to create a security breach. He states as follows:

It is because of the varying nature of this potential threat, we are particularly careful to scrutinize requests of ESQD arc information or arc maps and make determinations regarding the release of such information on a case-by-case basis ... we do not release this type of information to the public, if (such a) release (would pose) any threat of death or injury to any person - either inside or outside the installation boundaries.

Whitbred Dec. at ¶ 12.

1 Commander Whitbred explains that while he is aware that in the past ESQD Arcs may have  
 2 been released for Trident submarine bases at Kings Bay, Georgia and Bangor, Washington,  
 3 “Naval Magazine Indian Island is not a submarine base. The nature of its mission is completely  
 4 different, as are its security parameters and physical characteristics.” Whitbred Dec. at ¶ 14.  
 5 One difference is that the security parameters for a Trident submarine base include airspace  
 6 which is restricted as a matter of law. See, e.g., 14 C.F.R. § 73.93 (Establishing restricted  
 7 airspace over Bangor, WA). By contrast, Whitbred explains:

8 Naval Magazine Indian Island is not a single weapon-system facility,  
 9 such as [a submarine base]. Naval Magazine Indian Island is a depot  
 10 for multiple weapons, weapons components, ammunition and  
 11 explosives. [At the arsenal,] the items arrive and depart daily by  
 12 truck and ship. . . . We store/move explosives and ammunition for all  
 13 the military services, allied forces, Homeland Security and other  
 14 federal agencies. We have even store commercial explosives, such  
 as blasting agent, when it is determined that movement through a  
 military base is safer than through a commercial port. Thus, the mix  
 of explosives and ammunition types and the amounts held at Naval  
 Magazine Indian Island is in a constant state of flux. The difficulty  
 of monitoring and protecting such explosives from misuse is  
 concomitantly more complex.

15 Whitbred Dec. at ¶ 15. To better understand Commander Whitbred concerns, it is helpful to  
 16 review the attached Map of Naval Magazine Indian Island, which reveals numerous bunkers  
 17 scattered throughout the base, connected by a system of streets, and a large docking facility.  
 18 Ex. 3. Thus, the security concerns regarding the vulnerability of a working arsenal such as  
 19 Naval Magazine Indian Island raise entirely different problems from those associated with the  
 20 operation of a Trident submarine base.

21 Commander Whitbred explains that ESQD Arcs are part of an overall safety program  
 22 which is designed to maximize safety and minimize unintended consequences. Should an  
 23 accident occur, the safety program is designed to minimize and isolate any adverse effects. In  
 24 particular, Whitbred explains that the safety program is designed to store and handle explosives  
 25 in such a way that a fire or an explosion in one area will not set off an explosion in another area.  
 26 “This sort of chain reaction is known as a ‘sympathetic detonation’ and is a concept that DOD  
 27 has studied for years. Of course, a terrorist or other lawbreaker would employ this same concept  
 28 (in reverse) to create maximum damage with minimum outlay of effort. It is one of the reasons



1 we are so careful about releasing data, while we are focused on safety, others are not.” Whitbred  
2 Dec. at ¶ 16,

3 In other words, ESQD Arcs are precisely the type of information which could assist  
4 terrorists, other criminals, or adversaries in determining which attacks, sabotage, or other  
5 security breaches would result in the maximum loss of life and damage to property. Whitbred  
6 concludes as follows:

7 I support the right to freedom of information about the military as an  
8 essential component of the oversight and control of our government  
9 by its citizens. However, based on my training and experience, I  
10 believe strongly that release of the sensitive ESQD information  
11 involved in this case would jeopardize the safety and security of the  
12 storage, transportation and loading of ammunition and explosives;  
13 that it would create a serious threat to the base and its surrounding  
14 communities, and it would do little or nothing to promote the  
15 purpose of democratic oversight which is at the heart of the Freedom  
16 of Information Act.

17 Whitbred Dec. at ¶ 18. The strong opposition of Commander Whitbred to the release of this  
18 information, an opinion which is shared by his predecessor in command at Naval Magazine  
19 Indian Island, as well as other Navy experts who have considered this matter, are the reason why  
20 the Navy has taken the position in this case that the release of the ESQD Arcs for Naval  
21 Magazine Indian Island “could reasonably be expected to endanger the life or physical safety of  
22 any individual”,<sup>6</sup> and are the basis why the records here should be withheld under FOIA  
23 Exemptions 7(F) and 2.

## 24 **ARGUMENT AND AUTHORITIES**

### 25 I. Summary Judgment is Appropriate in FOIA Cases.

26 FOIA was enacted to pierce the veil of administrative secrecy and to open agency action to  
27 the light of public scrutiny. Department of the Air Force v. Rose, 425 U.S. 352, 361 (1976). See  
28 also Bowen v. FDA, 925 F.2d 1225, 1226 (9th Cir. 1991). However, the public’s interest in  
government information under FOIA is not absolute---“there are statutory exemptions that  
prohibit the government from disclosing certain information.” Bowen, 925 F.2d at 1226; see 5  
USC § 552(b)(1)-(9). “These exemptions reflect Congress’ recognition that the Executive

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<sup>6</sup> Attorney General’s Memorandum on the 1974 Amendments to the Freedom of Information Act, at <http://www.usdoj.gov/04foia/74agmemo.htm>.



1 Branch must have the ability to keep certain types of information confidential." Hale v. U.S.  
2 Department of Justice, 973 F.2d 894, 898 (10th Cir. 1992), vacated on other grounds, 509 U.S.  
3 918 (1993).

4 Although the agency has the burden of justifying non-disclosure of information in a FOIA  
5 action, the agency may meet its burden by submitting affidavits that "contain reasonably detailed  
6 descriptions of the documents and allege facts sufficient to establish an exemption [and] the  
7 district court need look no further." Lewis v. IRS, 823 F.2d 375, 377-78 (9th Cir. 1987).  
8 Consequently, summary judgment is routinely granted in FOIA cases on the basis of agency  
9 affidavits. If the affidavits provide specific information sufficient to place the documents within  
10 the claimed exemption, if this information is not contradicted in the record, and if there is no  
11 evidence in the record of agency bad faith, then summary judgment is appropriate. Gardels v.  
12 Central Intelligence Agency, 689 F.2d 1100, 1104-05 (D.C. Cir. 1982); Assassination Archives  
13 and Research Center v. Central Intelligence Agency, 177 F. Supp. 2d 1, 5-6 (D.D.C. 2001);  
14 Windels, Marx, Davies & Ives v. Department of Commerce, 576 F. Supp. 405, 409-11 (D.D.C.  
15 1983).

16 Under such circumstances, granting summary judgment in favor of the government is in  
17 accordance with congressional intent that courts give agency affidavits substantial weight in  
18 recognition of the agency's expertise, particularly in cases concerning questions of national  
19 security. Gardels, 689 F.2d at 1104-05; Assassination Archives and Research Center, 177 F.  
20 Supp. 2d at 5-6. Significantly, the test is not whether the court agrees with the agency's  
21 evaluation of the need to protect the information from disclosure, but rather whether the agency's  
22 judgment is sufficiently specific, reasonable and plausible and made in good faith. Gardels, 689  
23 F.2d at 1105. As one court has observed, "In FOIA cases it has been held that disputes regarding  
24 the risks created by disclosure, inherently a matter of some speculation, are not sufficient to  
25 create a triable issue of fact when the agency possessing relevant expertise has provided  
26 sufficiently detailed affidavits to justify its position that disclosure would pose significant risks."  
27 Windels, Marx, Davies & Ives, 576 F. Supp. at 410.

1 The Whitbred Declaration demonstrates how the release of the information could harm  
 2 personnel and property at Naval Magazine Indian Island, threaten the safety of communities near  
 3 the installation and risk circumvention of the law. Under established FOIA case law, the  
 4 information is protected from public disclosure under Exemption 7(F), pertaining to information  
 5 compiled for law enforcement purposes where the release of the information could reasonably be  
 6 expected to endanger the life or physical safety of individuals. For the same reason, the  
 7 information is protected under Exemption 2, which covers records related solely to the internal  
 8 practices of an agency.

## 9 II. The Navy Properly Withheld Information Under Exemption 7(F).

10 The Navy respectfully submits that the withheld information is protected from disclosure  
 11 under Exemption 7(F) of the FOIA. Exemption 7(F) contains a two part test: it protects 1)  
 12 "records or information compiled for law enforcement purposes," 2) where release of the records  
 13 or information ". . . could reasonably be expected to endanger the life or physical safety of any  
 14 individual." 5 USC § 552(b)(7)(F).

### 15 A. The Threshold Requirement Explosive Safety Data is Compiled for Law Enforcement Purposes.

#### 16 1. The Threshold Requirement

17 Information withheld under Exemption 7 must be "compiled for law enforcement purposes"  
 18 as a threshold requirement. Rosenfeld v. Department of Justice, 57 F.3d 803, 808 (9th Cir.  
 19 1995), cert. dismissed, 516 U.S. 1103 (1996).<sup>7</sup> The Ninth Circuit requires examination of the  
 20 agency itself to determine if the agency exercises a law enforcement function and has stated the  
 21 standard for meeting the threshold requirement in the following way:

22 The term "law enforcement purpose" has been construed to require an  
 23 examination of the agency itself to determine whether the agency may  
 24 exercise a law enforcement function. An agency which has a clear law  
 25 enforcement mandate, such as the FBI, need only establish a "rational  
 26 nexus" between enforcement of a federal law and the document for which  
 an exemption is claimed. However, an agency which has a "mixed"

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27 <sup>7</sup> Prior to the 1986 FOIA amendments, Exemption 7 applied only to "investigatory records compiled  
 28 for law enforcement purposes." The change from "investigatory records" to "records or information"  
 "broadened the scope of Exemption 7's threshold requirement." Hopkinson v. Shillinger, 866 F.2d 1185,  
 1222 n.27 (10th Cir 1989), on rehearing, 888 F.2d 1286 (10th Cir. 1989), overruled on other grounds,  
Sawyer v. Smith, 497 U.S. 227 (1990).

function, encompassing both administrative and law enforcement functions, must demonstrate that it had a purpose falling within its sphere of enforcement authority in compiling the particular document.

Church of Scientology v. Department of the Army, 611 F.2d 738, 748 (9th Cir. 1980).

In Living Rivers v. United States Bureau of Reclamation, 272 F. Supp. 2d 1313, 1318 (D. Utah 2003) the Court held that the Bureau of Reclamation was a "mixed agency" for purposes of exemption 7(F). In Living Rivers, the plaintiff sought disclosure of inundation maps prepared by the Bureau of Reclamation for the areas below two dams. The inundation maps requested showed which areas would be flooded in the event of a dam failure. Id at 1315. The court found that the Bureau of Reclamation possessed both a law enforcement function and an administrative function. The court found that Congress had "provided the Bureau of Reclamation with express law enforcement authority" to "maintain law and order and protect persons and property within Reclamation projects and on Reclamation lands." Id at 1318.

In Living Rivers, the Bureau of Reclamation argued "that materials compiled for purposes of protecting against and preventing violations of law, as opposed to only the more traditional law enforcement functions of investigation and prosecution," are exempted by Exemption 7(F) of FOIA. The court agreed. Id at 1318. Moreover, in Living Rivers the Bureau of Reclamation contended that it "uses the inundation maps to develop its Emergency Action Plans and to protect and alert potentially threatened people in the vicinity of the dams." Id at 1319.

It is not relevant why the information was originally compiled by the agency. The U.S. Supreme Court has held that "the wording of the phrase under scrutiny is simple and direct: "compiled for law enforcement purposes." The plain words contain no requirement that compilation be effected at a specific time. The objects sought merely must have been "compiled" when the Government invokes the Exemption." John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989). Once the documents sought are assembled for law enforcement purposes "all such documents qualify for protection under exemption 7 regardless of their original source." Kansi v. United States Department of Justice, 11 F. Supp. 2d 42, 44 (D.D.C. 1998).

2. The Navy is a "Mixed" Agency Possessing Both an Administrative Function and a Law Enforcement Function.

As with the Bureau of Reclamation, Congress has given the Navy express law enforcement authority to maintain law and order and protect persons and property over which the United States has jurisdiction.<sup>8</sup> The Navy exercises jurisdiction over all property it manages, in which the United States has either exclusive or concurrent legislative jurisdiction. The United States has concurrent jurisdiction over Naval Magazine Indian Island. See, Whitbred Dec. at ¶ 3.

In addition to federal legislative jurisdiction, the installation commander retains ultimate authority to protect the base from threats under the Internal Security Act of 1950. See, 50 USC § 797; United States v Floyd, 477 F.2d 217 (1973, CA10), cert denied (1973). Finally, the military maintains jurisdiction over military personnel at all times and all places, under the Uniform Code of Military Justice, 10 USC Chapter 47. The Director of the Naval Criminal Investigative Service is the senior Navy official for all criminal investigations, counterintelligence and security within the Department of the Navy.<sup>9</sup> Finally, the Navy has its own police force, security force, fire department, emergency medical force, emergency response personnel, explosive safety experts and law enforcement investigative arm: all of which it employs at Naval Magazine, Indian Island. See Whitbred Dec. at ¶ 3. Thus, the Navy has both civil and criminal jurisdiction over Naval Magazine, Indian Island.

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<sup>8</sup> See, 18 USC §1382 (which makes unauthorized entry onto any military, naval or Coast Guard reservation, post, fort, arsenal, yard, station, or installation a crime); 10 USC § 7480 (which authorizes the Navy and Marine Corps agents to serve warrants and make arrests); 28 CFR Part 60 (authority of federal law enforcement officers to request issuance of a search warrant); 10 USC § 1585 (which authorizes civilian officers and employees of the Department of Defense to carry firearms or other appropriate weapons while assigned investigative duties); 10 USC § 1585a (which authorizes special agents of the Defense Criminal Investigative Service to execute warrants and make arrests), 5 USC § 8331(20) (which defines "law enforcement officer", including reference to Navy employees); Public Law 99-145 § 1223 (which directed the Secretary of the Navy to prescribe regulations providing the Naval Criminal Investigative Service with authority to initiate and conduct criminal investigations); 10 USC § 801- 950 (Uniform Code of Military Justice); 40 USC §3112 (federal jurisdiction over lands) 18 USC § 641 (destruction of public property); 18 USC § 1361 (injury to government property); 18 USC § 1363 (government building or property in special maritime jurisdiction); 18 USC § 2155 (destruction of national defense materials, premises or utilities) and 18 USC §§ 3261 - 3266 (which even allows for extraterritorial Armed Forces criminal jurisdiction).

<sup>9</sup> Secretary of the Navy Instruction 5430.107; 28 December 2005 (Naval Criminal Investigative Service).

3. The Purpose of the Compilation is within the Navy's Authority to Protect Persons and Property.

The protective purpose of the compilation of the withheld information is within the Navy's authority to protect government personnel and property. This authority is derived from Congress through statutes which have granted the Secretary of Defense "authority, direction, and control over" its installations. See, 10 USC § 113(b). "The Secretary of the Navy is responsible for, and has the authority necessary to conduct, all affairs of the Department of the Navy." See, 10 USC § 5013(b). Congress has also provided that, in carrying out their responsibilities, the Secretary of Defense and the Secretary of the Navy have authority to "prescribe regulations for the custody, use, and preservation of property." 5 USC § 301. In addition, the Navy derives authority to maintain law and order on its property from the President.

Pursuant to their authority from Congress and the President, DoD and the Navy have issued a number of regulations that provide for and direct the protection of government property and personnel. These regulations regulate the security of DoD Installations and Resources,<sup>10</sup> and they establish general policies for the security of personnel and installations.<sup>11</sup> Commanding officers also have general responsibility for the security of matters within their commands.<sup>12</sup>

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<sup>10</sup> DoD Directive 5200.8, "Security of DoD Installations and Resources," <http://www.dtic.mil/whs/directives/corres/html/52008.htm>, states in section 3: "It is DoD policy that . . . [m]ilitary installations, property, and personnel be protected and that applicable laws and regulations be enforced," and "[t]he authority of a DoD installation commander to take reasonably necessary and lawful measures to maintain law and order and to protect installation personnel and property has long been recognized."

<sup>11</sup> DoD Directive 5200.8 authorizes the publication of DoD 5200.8-R, "Physical Security Program," <http://www.dtic.mil/whs/directives/corres/html/52008r.htm>. The objectives of this regulation are stated in section C1.3; they include: "Establish general policy for the security of personnel and installations, military operations, and certain assets," "Provide realistic guidance . . . for Commanders to protect personnel, installations, operations & assets from typical threats," and "Reduce the loss, theft, or diversion of, and damage to DoD assets, thereby ensuring that warfighting capability is maintained."

<sup>12</sup> OPNAV Instruction 5530.14D, "Navy Physical Security," <http://neds.nebt.daps.mil/553014.htm>, states in paragraph 6.1: "Commanding officers of installations, ships, squadrons & units shall implement the security & law enforcement policies & procedures contained [herein] and Section 797 of Title 50 U.S. Code."

Regulations concerning terrorism also provide for and direct the protection of property,<sup>13</sup> and authorize the implementation of broad security measures to protect installations, and military personnel and their families from terrorist threats. In addition, the violation of a military regulation or order that protects property is a crime.<sup>14</sup> The various Washington State criminal statutes that protect property and persons are also applicable to property and personnel at Naval Magazine Indian Island.<sup>15</sup> Each of these legal requirements is a “law” within the meaning of “law enforcement” in Exemption 7. The above statutes and regulations, and the inherent power of commanding officers to maintain law and order within their command, make clear that the Navy’s purpose in compiling the withheld information was within its authority to protect persons and property.

4. The Compilation Was for “Law Enforcement Purposes”  
Because It Served to Prevent the Violation of Statutes and Regulations.

Naval Magazine Indian Island compiled explosive safety information (including ESQD Arcs), and uses that information to meet its explosive safety, emergency response, physical security and law enforcement obligations. As with the inundation maps in Living Rivers, Naval Magazine Indian Island has both compiled and actively utilized this information for the “purposes of protecting against and preventing violations of law” including to protect potentially threatened people within or near the base.

The Navy originally generated the explosive safety data for the purpose of analyzing the safety of the handling and storage of ordnance, ammunition and other explosives and ensuring

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<sup>13</sup> See DoD Directive 2000.12, “DoD Antiterrorism (AT) Program,” where it states in section 4.1 that “[t]he DoD components and the DoD Elements and Personnel shall be protected from terrorist acts.” Section 4.2 of the Directive states that the following is DoD policy:

The Commanders at all levels shall have the responsibility and authority to enforce appropriate security measures to ensure the protection of DoD Elements and Personnel subject to their control and shall ensure the AT awareness and readiness of all DoD Elements and Personnel (including dependent family members) assigned or attached. Commanders must ensure appropriate AT protection and readiness of DoD Elements and Personnel while pursuing mission accomplishment.  
<http://www.dtic.mil/whs/directives/corres/html/200012.htm>.

<sup>14</sup> See 50 USC §797.

<sup>15</sup> State criminal law is applicable to offenses committed at Naval Magazine Indian Island. 18 USC §13.



1 that appropriate safety measures are taken. Whitbred Dec. at ¶¶ 10, 16. The Navy has gathered  
 2 and used the withheld information not only for the purpose of identifying and addressing safety  
 3 hazards, but also for the purpose of identifying and addressing security issues. In particular, the  
 4 Navy has used the withheld information to make improvements that enhance both the safety and  
 5 the security of the base. Especially in light of the explosive nature and the variety of the items  
 6 stored, it is evident that the ultimate purpose for the compilation of the withheld information is  
 7 the protection of the ordnance itself, the base, other property, and people from damage, loss,  
 8 death, or injury that could occur from an incident, accident, or breach of security. Whitbred Dec.  
 9 at ¶¶ 3, 9 & 13).

10 The compilation of the withheld information helped the Navy identify, correct and protect  
 11 against deficiencies or vulnerabilities of the Naval Magazine Indian island. This action thus  
 12 served to prevent the misuse, destruction, damaging, sabotage, or theft of the weapon systems or  
 13 their components, and thereby served the purpose of preventing the crimes and other violations  
 14 prohibited by the laws described above. This prophylactic purpose of the compilation is a “law  
 15 enforcement purpose” within the meaning of Exemption 7. As the Attorney General stated in  
 16 1975 concerning the meaning of Exemption 7: “Law enforcement” includes not merely the  
 17 detection and punishment of law violation, but also its prevention.”<sup>16</sup> Thus Exemption 7 has  
 18 been applied in a variety of contexts to protect information compiled for the purpose of  
 19 preventing violations of the law. See Living Rivers, 272 F. Supp.2d at 1318-21 (holding that, in  
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21 <sup>16</sup> The “law” to be enforced within the meaning of Exemption 7 includes both civil and criminal law.  
 22 See Church of Scientology International v. Internal Revenue Service, 995 F.2d 916, 919 (9th Cir. 1993)  
 23 (citing with approval the statement in Center for Nat’l Policy Review on Race & Urban Issues v.  
 24 Weinberger, 502 F.2d 370, 373 (D.C. Cir. 1974) that “civil as well as criminal law enforcement  
 25 activities are within the purview” of Exemption 7); Rural Housing Alliance v. Department of  
 26 Agriculture, 498 F.2d 73, 81 n. 46 (D.C. Cir. 1974) (“The character of the statute violated would rarely  
 27 make a material distinction, because the law enforcement purposes protected by Exemption 7 include  
 28 both civil and criminal purposes . . . .”) See also Attorney General’s Memorandum of the 1986  
 Amendments to the Freedom of Information Act, p. 8, n.13, <http://www.usdoj.gov/oip/86agmemo.htm>  
 (“Of course, a ‘law enforcement purpose’ under Exemption 7 includes the enforcement of civil as well  
 as criminal laws, as well as statutes authorizing administrative (i.e., regulatory) proceedings.” (Citations  
 omitted.)). Exemption 7 also applies to information compiled to enforce state or local law. See  
Hopkinson v. Shillinger, 866 F.2d 1185, 1222 n. 27 (10th Cir 1989), on rehearing 888 F.2d 1286 (10th  
 Cir. 1989) overruled on other grounds, Sawyer v. Smith, 497 U.S. 227 (1990); Shaw v. FBI, 749 F.2d  
 58, 64-65 (D.C. Cir. 1984); Wojtczak v. United States Dep’t of Justice, 548 F. Supp. 143, 146-48  
 (E.D.Pa. 1982).



light of Bureau of Reclamation's authority to "maintain law and order and protect persons and property within Reclamation projects and on Reclamation lands," inundation maps showing flooding that would be caused by a dam failure that might result from a terrorist attack were compiled for "law enforcement purposes"); U.S. News & World Report v. Department of the Treasury, No. 84-2303, 1986 U.S. Dist. LEXIS 27634, at \*2-10 (D.D.C. Mar. 26, 1986) (holding that, in light of the Secret Service's function of protecting the President, procurement information concerning the specifications, equipment, parts, weight, product numbers, and component-part prices of armored limousines for the protection of the President were compiled for "law enforcement" purposes); Moorefield v. U.S. Secret Service, 611 F.2d 1021, 1024 (5th Cir. 1980) (holding that information prepared to help the Secret Service fulfill its duty to protect the lives and safety of the President, his family, and other persons were compiled for "law enforcement purposes"); Librach v. Federal Bureau of Investigation, et al, 587 F.2d 372, 373 (8th Cir. 1978), cert denied (1979) (assuming that the Marshal's Service's efforts to protect witnesses was a law enforcement function, and affirming application of Exemption 7 to records pertaining to the relocation of a witness whose disclosure "would jeopardize the effectiveness of the Witness Security Program"); Church of Scientology of California v. Department of the Air Force, No. 76-1008, 1978 U.S. Dist. LEXIS 18428, \*8-9 (D.D.C. Apr. 12, 1978) (citing Attorney General's statement that "'law enforcement' includes not merely the detection and punishment of law violation, but also its prevention" and thus holding that an Air Force report of investigation and memorandum were "compiled for law enforcement purposes"); Zamnik v. Department of State, 1 GDS ¶ 79,114 (D.D.C. 1979) (holding that Foreign Affairs Manual, which contained methods for identifying and notifying Secret Service of individuals who may pose threat to government officials, was properly withheld under Exemption 7(E)) (AR at Tab 29). See also United States v. Eastern Airlines, 792 F.2d 1560, 1561 n.1 (11th Cir. 1986) (suggesting that air carrier security programs were protected by Exemption 7(E)).

These cases demonstrate that the purpose of the compilation of the withheld information is within the Navy's authority to take action to protect government property and personnel, and that this authority and its exercise through the compilation of the withheld information are for "law

enforcement,” because they serve to prevent the violation of laws that protect government property and personnel. In this context, the Court should provide some deference to Commander Whitbred’s conclusions with respect to the law enforcement implications of the disclosure of the information in this case. See Center for National Security Studies v. U.S. Dept of Justice, 331 F.3d 918, 927-928 (D.C. Cir. 2000).

B. Release Of The Records Could Reasonably Be Expected To Endanger Persons or Property.

When the threshold requirement of Exemption 7 is met, the court must then determine that the “release of the records or information “could reasonably be expected to endanger the life or physical safety of any individual.” 5 U.S.C. §552(b)(7)(F). In his Declaration, Commander Whitbred states that he has no doubt that the release of the records in question could reasonably be expected to endanger the life or physical safety of individuals both at Naval Magazine Indian Island, as well as others residing near the base at communities such as Hadlock and Nordland. Whitbred Dec. at ¶ 18. Also see attached Map of Indian Island and Surrounding Communities. Ex. 4. More specifically, Commander Whitbred points out how a lay person could use this information with only a rudimentary knowledge of mathematics to determine the precise location of ordnance magazines, the types of items stored in them, which locations to target for maximum damage to personnel, critical infrastructure and disruption of loading and off-loading of ships, the mission capability of the base, the battle group capability and operational sustainability and the location of personnel and the precise numbers of personnel required to load and offload a ship.

As Commander Whitbred points out, ESQD Arcs and explosives standards are designed to provide the inhabitants of nearby communities, the personnel of Department of Defense shore activities and adjacent public and private property reasonable safety from serious injury or destruction from fires or explosions and to minimize the loss of valuable ammunition stores through fires or explosions. In the wrong hands, however, this information could be used to harm persons or property or to threaten the security of the installation, the personnel on the installation and nearby communities. Whitbred Dec. at ¶¶ 8 & 9. The ultimate purpose of the explosives safety program is to protect property and people from harm that could occur from an

1 incident, accident or breach of security, and part of the Commanding Officer's job is to safeguard  
2 sensitive information that could be used to create a security breach. See, Whitbred Dec. at ¶¶ 1,  
3 5 and 13.

4 As Whitbred explains, ESQD Arcs were used at Naval Magazine Indian Island to design,  
5 array, and construct ammunition storage facilities, and to organize ammunition operations for  
6 risk mitigation and enhanced safety. While all ESQD Arcs can be "reversed engineered" to  
7 create targets of opportunity, those prepared for the base at Indian Island would reveal more than  
8 other ESQD Arcs would about the particular ammunition, explosive or weapons system  
9 maintained at that location, and are of a higher level of sensitivity than ESQD Arcs prepared for  
10 other purposes. Whitbred Dec. at ¶ 12. Such information could assist terrorists, other criminals,  
11 or adversaries in determining which attacks, sabotage, or other security breaches would result in  
12 the maximum loss of life and damage to property. Whitbred Dec. at ¶ 16. Given the dangerous  
13 nature of the items stored at Naval Magazine Indian Island, and the current worldwide threat of  
14 terrorism, the risk to human life and physical safety from a release of the ESQD Arcs is real,  
15 obvious, and significant, and well within reasonable expectations. See Living Rivers, at 1321-22  
16 (holding that inundation maps were protected under Exemption 7(F), because release of maps  
17 showing flooding resulting from dam failure would increase the risk to human life and safety  
18 from terrorist attack. Consequently, the release of the information would meet the standard  
19 under Exemption 7(F), in that it "could reasonably be expected to endanger the life or physical  
20 safety of any individual."<sup>17</sup> As noted above, the government's assessment of danger under  
21 Exemption 7(F) is entitled to deference. See Living Rivers, at 1321, and cases cited therein. In  
22 conclusion, then, the Navy respectfully submits that the ESQD Arcs should be protected from  
23 disclosure under Exemption 7(F).

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<sup>17</sup> Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, at  
<http://www.usdoj.gov/oip/74agmemo.htm>.

1        III. The Explosive Safety Information Also Is Properly Withheld under Exemption 2  
 2        Because it Constitutes "Law Enforcement Materials," the Release of Which  
 3        Would Risk Circumvention of Law and Regulation.

4        A second basis for the withholding of the materials in  
 5        this case is FOIA's Exemption 2. Exemption 2 protects from disclosure "matters that are . . .  
 6        related solely to the internal personnel rules and practices of an agency." 5 USC §552(b)(2).  
 7        The Supreme Court in Department of Air Force v. Rose, 425 U.S. 352 (1976), interpreted  
 8        Exemption 2 in light of FOIA's legislative history and indicated that Exemption 2 might be  
 9        applicable to information "where disclosure may risk circumvention of agency regulation."  
 10       Dirksen v. Department of Health & Human Services, 803 F.2d 1456, 1458 (9th Cir. 1986), citing  
 11       Rose, 425 U.S. at 369.

12       The Ninth Circuit, in reliance on the Supreme Court's decision in Rose, has found that "law  
 13       enforcement materials, disclosure of which may risk circumvention of agency regulation," are  
 14       properly withheld under Exemption 2. Hardy v. Bureau of Alcohol, Tobacco and Firearms, 631  
 15       F.2d 653, 655-57 (1980). Dirksen v. Department of Health & Human Servs., 803 F.2d 1456,  
 16       1458 (9th Cir. 1986). In Hardy, the Ninth Circuit held that Exemption 2 covered a training  
 17       manual for federal agents on how to conduct raids and searches. 631 F.2d at 657. In Dirksen,  
 18       the Ninth Circuit recognized that the definition of "law enforcement materials" included  
 19       processing guidelines for Medicare claims. 803 F.2d at 1458-59. The Court ruled that the  
 20       guidelines would lose their "utility" if released to the public because prospective claimants  
 21       would use the guidelines to "fit" their respective claims into the automatically granted category.  
 22       Id.

23       The materials found to meet Exemption 2 in Hardy and Dirksen are commonly referred to  
 24       as "high 2" information, while the more trivial internal personnel materials are referred to as  
 25       "low 2" information. Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1061  
 26       (D.C. Cir. 1981) (en banc). The Crooker court formulated a two-part test for "high 2" exempt  
 27       information: if a document is "predominantly internal" and if its disclosure would significantly  
 28       risk circumvention of agency regulation or statute, it is exempt from disclosure under  
 29       Exemption 2. Id. at 1073-74. Information is "predominantly internal" if it was developed

1 predominantly for internal use and does not constitute "secret law" – that is, it does not purport  
2 to regulate conduct among members of the public or set standards to be followed by agency  
3 personnel in deciding whether to take actions affecting members of the public. See Crooker, 670  
4 F.2d at 1073-74. For instance, in Maricopa Audubon Society v. U.S. Forest Service, 108 F.3d  
5 1082, 1086 (9th Cir. 1997), the Ninth Circuit refused to find that the Forest Service's northern  
6 goshawk nest site information constituted law enforcement materials. In holding that Exemption  
7 2 did not apply, the court stated that "[t]he requested information does not tell the Forest Service  
8 how to catch lawbreakers; nor does it tell lawbreakers how to avoid the Forest Service's  
9 enforcement efforts." Id. See also, Coastal Delivery, 272 F. Supp. 2d at 965. By contrast, in this  
10 case, the information at issue the location and quantity of ordnance which, if released, would  
11 assist lawbreakers or adversaries in avoiding the safety and security measures that the Navy has  
12 in place to meet its statutory and regulatory law enforcement responsibilities to protect life and  
13 property.

14 Accordingly, for the same reasons discussed above that the ESQD Arcs would be covered  
15 by Exemption 7(F), they would also qualify as high 2 information. The Navy has established  
16 that the withheld information has law enforcement purposes – namely, that the information has  
17 been used to enhance the safety and security of the Naval Magazine Indian Island. The withheld  
18 information, if released, would provide a blueprint for terrorists in sabotaging the Naval  
19 Magazine Indian Island. Indeed, allowing release of the aircraft hazard information and the  
20 facility and equipment drawings, for example, would assist terrorists in planning the same type  
21 of attack that occurred on September 11, 2001. Releasing the information would, therefore,  
22 allow terrorists or other potential enemies to circumvent the Navy's law enforcement  
23 responsibilities in protecting against such attacks. If released, the redacted information would  
24 thus lose its "utility" in serving to enhance the safety and security of Naval Magazine Indian  
25 Island. Dirksen, 803 F.2d at 1459.16

26 The Navy has thus reasonably explained through Commander Whitbred's declaration that  
27 the withheld information involves law enforcement materials the release of which would risk  
28 circumvention of law and regulation. Hardy, 631 F.2d 657-58 (in remanding to the district court,

Ninth Circuit stated that the withheld information should be exempt from disclosure if agency affidavit reasonably explains that the information involves law enforcement material, the disclosure of which would circumvent agency regulation). See Buffalo Evening News v. U.S. Border Patrol, 791 F. Supp. 386, 393 (W.D.N.Y. 1992) (emphasizing that agency need not show actual circumvention of law, merely risk of circumvention of law). See also Center For National Security Studies, 331 F.3d 927-928. (in applying "substantial weight" deference standard to an affidavit in support of an Exemption 7 issue that involved national security, court stated "[j]udicial deference depends on the substance of the danger posed by disclosure--that is, harm to the national security--not the FOIA exemption invoked").

Accordingly, for the reasons discussed here and under the Exemption 7 section above, the information is properly exempt from disclosure under Exemption 2. See, Coastal Delivery Corp. v. Customs Service, 272 F. Supp. 2d 958, 965 (CD Calif. 2003) (court held that because agency had established that the withheld information had a law enforcement purpose under Exemption 7, the information could also be withheld under Exemption 2 under "the Ninth Circuit test" for "high 2" information).

### CONCLUSION

For all the foregoing reasons, defendant Navy respectfully requests that the Court grant the Navy's motion for summary judgment, and enter judgment in favor of the Navy on the grounds that the explosive safety information withheld is exempt from disclosure under FOIA.

DATED this March 16, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date I electronically filed the foregoing Defendant's Answer with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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DATED March 16, 2007.

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